APPENDIX A

AMENDED OPINION

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1035

TONI MURRAY,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 1176—**Julius J. Hoffman**, *Judge.*

ARGUED SEPTEMBER 8, 1980—DECIDED NOVEMBER 25, 1980
OPINION AMENDED MARCH 11, 1981

Before SWYGERT and SPRECHER, *Circuit Judges*, and DUMBAULD,* *Senior District Judge.*

DUMBAULD, *Senior District Judge.* Appellant in the case at bar was the victim of a theft, and then of a deprivation of her constitutional rights by reason of arrest without a valid warrant. Her complaint under 42 U.S.C. 1983[1] was dismissed by the District Court as to

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory, subjects, or causes to be subjected, any citizen of the United States or

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certain defendants, and summary judgment granted in favor of another defendant. The circumstances are as follows:

Appellant's purse and checkbook were stolen. The theft was reported to the police. Six to twelve months later, some of the stolen checks were cashed at various retail stores.[2] Presumably on complaints made by the stores, appellant was arrested on charges of deceptive practices and at a hearing on November 4, 1974, before Branch 68 of the Circuit Court of Cook County all complaints against her were dismissed except one which was continued until December 9, 1974. Being under the impression that all charges had been dismissed, she did not appear on December 9, 1974, and a warrant was issued for her arrest. On January 13, 1975, appellant, having learned of the warrant, appeared in Branch 68, and the warrant of December 9 was quashed and recalled by the court. On February 10, 1975, the single complaint remaining against appellant was dismissed.

Then on March 25, 1975, several months after the warrant of December 9, 1974, had been quashed, appellant was arrested at her home by two Chicago police officers, pursuant to the invalid warrant.

Although she explained to the officers that the warrant had been recalled, she was taken to headquarters, forced to strip naked and submit to searches conducted and observed by Chicago police officers. After subsequently being imprisoned for six or seven hours, she was released, and after again appearing before Branch 68 on April 10, 1975, was discharged. Following

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[1] *continued*
other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Presumably the checks may have had her name printed on them, and the thief knew whose name to forge. It does not appear whether the forged checks exceeded her balance or were rejected by the bank as forgeries.

her release from police custody she received medical treatment and was hospitalized for five days.

Appellant's complaint named as defendants: (1) the City of Chicago; (2) James T. Rochford, Superintendent of the Chicago Police Department at the time of the events described above; (3) his successor in office, James O'Grady; (4) the arresting officers Pappas and Ziemke; and (5) Morgan M. Finley, Clerk of the Circuit Court of Cook County, Illinois.

The District Court granted motions to dismiss as to the city, relying on *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 690-91 (1978), for requirement of a showing of policy or custom; and as to Rochford and O'Grady on the ground of lack of personal participation; and as to the arresting officers on the ground that the warrant appeared on its face to be valid, relying on *Baker v. McCollan*, 443 U.S. 137, 143-46 (1979). As to Finley, summary judgment was granted on the ground that affidavits showed that Finley's procedures were satisfactory and adequate.

However, affidavits merely showed that the clerk's office personnel were aware of the importance of promptly transmitting warrant recalls and that they were to be transmitted to the police on the same day; and that the order in plaintiff's case was deposited in a location similar to an "out basket," but the affiant did not know what happened to it thereafter. The affidavits did not show how the documents were handled from that point to the police department, whether by mail or by hand delivery. The affidavits submitted by the police department simply stated that examination of the book in which such items should have been listed failed to disclose any record of the recall of the warrant in appellant's case.

It seems clear that appellant sustained a violation of constitutional rights by being arrested and detained pursuant to an invalid warrant. The defendants should not be permitted to "get off the hook" by merely pointing the finger at each other. Someone is surely at fault for failing to establish or execute appropriate

procedures for preventing such serious malfunctionings in the administration of justice. Plaintiff should be entitled to discovery in order to determine who is the true culprit responsible for the wrong done her.[3] It would be premature to deny appellant relief at the present stage of the case, in advance of discovery or trial. Summary judgment should not be granted unless it is clear that upon no conceivable state of facts as shown by the proof could a plaintiff recover. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

In the case at bar, as to the city, it is possible that existence of a policy, custom, or practice might be established. If plaintiff succeeds in proving her allegation that similar unwarranted arrests have occurred frequently, to the knowlege of the parties involved, it might be possible to show dereliction of duty of constitutional dimension upon the part of the responsible officials.[4]

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[3] Defendants argue that appellant could have been more diligent in seeking discovery during the period between filing of the complaint and granting of summary judgment. But it is common practice for lawyers to defer discovery until after determination of motions which might make discovery otiose by disposing of the case upon controlling questions of law. Or discovery *in limine* may sometimes appropriately be limited to jurisdictional questions. *Fraley v. C.&.O. Ry. Co.*, 397 F. 2d 1, 4 (3rd Cir. 1968).

[4] It is highly probable that in due time O'Grady, a mesne holder of the position of Superintendent of Police, will be dismissed, as his actions have had no causative impact upon appellant. Her request for equitable future relief and supervision by a federal court of the office management methods of the state officials involved is of questionable validity. See *Rizzo v. Goode*, 423 U.S. 362, 378-80 (1976). However, even though the case at bar is not a class action, there is a growing trend toward granting "structural" relief and we express no opinion as to its propriety here. See Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L.R. (May, 1976) 1281, 1309; Cox, The Role of the Supreme Court in American Government (1976) 88-98.

It is quite possible that the clerk of court, Finley, will also ultimately be dismissed if by amplified clarification of his

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With respect to the arresting officers themselves, good faith action under apparently valid authority is an affirmative defense which they must plead and prove. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). But see *Joseph v. Rowlen*, 402 F. 2d 367, 370 (7th Cir. 1968).

It was error for the District Court to rely upon *Baker v. McCollan*, 443 U.S. 137, 143 (1979), as a basis for dismissing the action against the arresting officers. In that case there was a valid warrant. It merely named the wrong suspect, a defect similar to *idem sonans*.[5]

The judgment of the District Court is reversed and the case remanded for trial. Circuit Rule 18 shall apply.

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[4] *continued*
procedures, he is able to establish that the methods used to convey recall orders to the police department are appropriate and adequate. See *Schnell v. City of Chicago*, 407 F. 2d 1084, 1086 (7th Cir. 1969).

Mere negligence, of course, will not support a § 1983 action against Finley. See *Bonner v. Coughlin*, 545 F. 2d 565, 568 (7th Cir. 1976). Moreover, pending further clarification of the facts it would be premature to consider whether Finley is entitled to the defense of official immunity. See *Dieu v. Norton*, 411 F. 2d 761, 763 (7th Cir. 1969).

[5] The warrant erroneously named Linnie, not Leonard McCollan.

SWYGERT, *Circuit Judge*, concurring.* Although I agree with the result announced in the majority opinion, I disagree with the implication in footnote 4 that plaintiff must prove that defendant Finley's actions were intentional or reckless. The majority states that mere negligence will not support a § 1983 action against Finley, *Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976). While this standard applies in many factual situations, the majority fails to note that some official duties are mandatory. *McCray v. Maryland*, 456 F.2d 1, 5 (4th Cir. 1972).

In *McCray*, plaintiff alleged that the court clerk impeded the filing of certain papers. The court held that where an official fails to follow a court order or acts in violation of his statutory duties, "no immunity [is] recognized and the officer [is] held liable under section 1983 if his actions abridged an individual's federally protected rights." 456 F.2d at 5.[1]

I believe that if plaintiff shows at trial that Finley had a mandatory duty to execute the court's order to recall the arrest warrant, then she does not have to prove that his failure to do so was intentional or reckless. Further, if it is shown that Finley's duty to execute warrant recalls is ministerial rather than discretionary, he would

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* An amended opinion was issued on March 11, 1981 reflecting certain changes in footnote 4 appearing on pages 4-5. This concurring opinion was filed in response to those changes.

Chief Judge Fairchild and Judge Cudahy voted to deny rehearing *en banc*. Their votes are predicated upon the view expressed in Judge Swygert's concurring opinion.

[1] The court went on to note that when an official acts in violation of duties imposed upon him by law, he is "entitled to no more protection than any other state ministerial functionary who fails to discharge a mandatory duty." 456 F. 2d at 5 (citing *Whirl v. Kern*, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969)).

not be entitled to immunity.[2] *McCray v. Maryland, supra*, 456 F.2d at 4; *Norwood v. Soloman*, 431 F. Supp. 380 (E.D. Mo. 1977).

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] The Fourth Circuit explained the rationale for distinguishing between ministerial and discretionary duties in considering whether immunity is applicable:

> The immunity of "quasi-judicial" officers . . . derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend him the protection of absolute judicial immunity . . . .

456 F.2d at 4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONI MURRAY,

Plaintiff,

No. 79 C 1176 v.

THE CITY OF CHICAGO, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JULIUS J. HOFFMAN, Senior Judge of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, November 30, 1979, commencing at the hour of 10:00 a.m.

APPEARANCES:

MR. LAWRENCE SCHLAM
2125 North Clark Street
Chicago, Illinois 60614
on behalf of Plaintiff;

CITY OF CHICAGO DEPARTMENT OF LAW
City Hall, Room 511
Chicago, Illinois 60602
BY: MS. JENNIFER DUNCAN-BRICE
on behalf of Defendants City of Chicago, John Ziemke, Theodore Pappas, James Rochford and James O'Grady;

HON. WILLIAM J. SCOTT
2650 South California Avenue, Room 14-C
Chicago, Illinois 60630
BY: MS. ELLEN G. ROBINSON
on behalf of Defendant Morgan Finley.

THE CLERK: 79 C 1176, Toni Murray v. The City of Chicago, et al.; for ruling, motion of the defendants to dismiss the complaint or, in the alternative, for summary judgment.

THE COURT: Good morning.

MS. ROBINSON: Good morning, your Honor. Ellen Robinson, Assistant State's Attorney, on behalf of the defendant Morgan Finley.

MS. DUNCAN-BRICE: Good morning, your Honor. Jennifer Duncan-Brice on behalf of the defendants Ziemke, Pappas, Rochford, O'Grady and The City of Chicago.

MR. SCHLAM: Good morning, your Honor. I am Lawrence Schlam on behalf of the plaintiff in this cause.

THE COURT: I have this case here for ruling on the motions of the defendants to dismiss the complaint or, in the alternative, for summary judgment.

This is an action brought pursuant to 28 U.S.C. Section 1331 and 1343 and under 42 U.S.C. Sections 1983, 1985, 1986 and 1988, to recover for the alleged deprivations of the plaintiff's civil rights by the six named defendants.

According to the complaint, the plaintiff was arrested in 1974 as the result of certain of her checks appearing and being unlawfully cashed at various retail stores. The plaintiff asserts that her purse and checkbook had been stolen earlier in the year.

On November 4, 1974, the plaintiff appeared in the Circuit Court of Cook County to answer the charges filed against her. At that hearing all but one of the complaints filed against her were dismissed. However, it is asserted in the complaint that the plaintiff was under the reasonable belief that all charges had been dismissed on that day so that the plaintiff failed to appear

at the next hearing on December 9, 1975. That failure to attend resulted in an arrest warrant being issued for the plaintiff. It is that warrant which is the subject matter of this action.

The plaintiff alleges that she learned of the new arrest warrant and appeared of her own volition on January 13, 1975. On that day the arrest warrant was quashed and recalled by the Court.

On February 10, 1975, the case was dismissed against the plaintiff. Notwithstanding the fact that the plaintiff's case had been dismissed and the fact that the arrest warrant had been judicially recalled on January 13, 1975, the plaintiff alleges that she was arrested on March 25, 1975, pursuant to that judicially-recalled arrest warrant.

The plaintiff was subsequently taken to a police station where she was subjected to a strip search and was incarcerated for six to seven hours. The plaintiff alleges that she was then required again to appear in the Circuit Court of Cook County on April 10, 1975, to answer charges that were nonexistent as there were no warrants outstanding against her. The plaintiff further asserts that she suffered severe emotional and physical injuries as the result of the unlawful arrest and detention.

The plaintiff seeks both monetary and injunctive relief against all of the defendants. Those defendants are: The City of Chicago; James T. Rochford, the then Superintendent of the Chicago Police Department; James O'Grady, Superintendent Rochford's successor; John Ziemke and Theodore Pappas, the police officers who effectuated the arrest of the plaintiff on March 25, 1975; and Morgan M. Finley, Clerk of the Circuit Court of Cook County.

All six of the defendants have filed motions to dismiss the complaint or, in the alternative, for summary judgment.

Numerous grounds are asserted by the defendants and each of the motions for summary judgment is accompanied by affidavits. The plaintiff has filed no af-

fidavits in opposition to the motions for summary judgment.

The Court will treat each of the defendants' motions individually and, where appropriate, will consider the motions to dismiss without consideration of any supporting documents. Wholesale Auto Supply Company v. Hickok Manufacturing Company, 221 Federal Supplement 935, Eastern District of New Jersey, 1963.

Dealing first with the motion of the defendant City of Chicago to dismiss the complaint, the Court observes that the plaintiff asserts liability on the part of the City of Chicago on the basis that its control of the ministerial functions of the Chicago Police Department requires the City to promulgate warrant recall procedures that will prevent invalid arrests such as is alleged to have occurred here. The plaintiff asserts that the present procedure for the recall of warrants is unconstitutional as it results in the arrest of innocent individuals. Accordingly, the plaintiff alleges that the defendant City of Chicago is liable to the plaintiff for her invalid and allegedly unconstitutional arrest pursuant to a judicially-recalled arrest warrant.

The City of Chicago seeks the dismissal of this complaint as to it primarily on the ground that, as a municipality, it cannot be held liable for the alleged constitutional violations of its subordinates under a theory of respondeat superior. The defendant recognizes changes in the law of Section 1983 liability that will render a municipality liable under certain circumstances, but asserts that the plaintiff's complaint does not present the Court with such a situation. This Court agrees with the defendant City of Chicago and finds that the complaint must be dismissed as to this defendant.

Until recently, municipal entities were immune from suit under 42 U.S.C., Section 1983. Monroe v. Pape, 365 United States 167, 1961.

However, the Supreme Court decision of Monell v. Department of Social Services of the City of New York, 436 United States 658, 1978, removed the absolute immunity previously afforded to municipalities and their

agencies and held that in certain circumstances, municipalities may be amenable to suit under 42 U.S.C., Section 1983.

After a lengthy discussion of the history of the civil rights statutes, the Supreme Court specifically held in that case that the doctrine of respondeat superior has no application to alleged violations of 42 U.S.C., Section 1983. The Court did hold, however, that a municipality may be held liable for such violations if it is clear that:

> "the action that is alleged to be unconstitutional implements a policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers."

Monell v. Department of Social Services of the City of New York, 436 United States 658 at 690.

The Court further stated that liability will only be imposed if such a specific policy is alleged to exist and that policy causes an employee of the municipality to violate the constitutional rights of another. The Monell decision is clearly distinguishable from the present controversy.

In that decision, the Supreme Court was faced with a policy of the City of New York that compelled pregnant female employees to take unpaid leaves of absence. Such a policy required municipal employees to compel their female subordinates to take those unpaid leaves of absence. Accordingly, the Supreme Court held that such a policy of the municipality could be said to cause a violation of the plaintiffs' civil rights within the meaning of 42 U.S.C., Section 1983.

Such a policy and resulting causation does not appear from the plaintiff's complaint in this action. Not only has the plaintiff failed to specifically allege what the current warrant recall procedure of The City of Chicago is; she also fails to specifically allege facts showing that the policy requires a subordinate municipal employee to violate a citizen's civil rights. Absent such specific allegations, the policy cannot be said to cause the alleged constitutional violation and the complaint must be dismissed as to The City of Chicago. Jamison v. McCurrie,

565 F.2d 483, Seventh Circuit, 1977 and McDonald v. State of Illinois, 557 F.2d, Seventh Circuit, 1977.

Although the plaintiff has clearly attempted to draw her complaint in order to present the Court with a case within the limited perimeters of the Monell decision, the Court must conclude that the plaintiff alleges only a theory of vicarious liability under the doctrine of respondeat superior as to The City of Chicago. The plaintiff is asserting that the employer City must be held liable for the alleged constitutional torts of its employees based on the City's control over the warrant recall procedure.

The mere right to control without any control or direction having been exercised is not enough to support Section 1983 liability. Rizzo v. Goode, 423 United States 362, 1976.

Accordingly, since liability under 42 U.S.C., Section 1983 and 28 U.S.C., Section 1931 cannot be founded upon such a theory, the complaint must be dismissed as to The City of Chicago for failure to state a claim upon which relief may be granted. Hampton v. City of Chicago, 484 F.2d 602, Seventh Circuit, 1973, certiorari denied, 415 United States 917, 1974, and Gresham v. City of Chicago, 405 Federal Supplement 410, Northern District of Illinois, 1974.

We deal next with the motions of the defendants Rochford and O'Grady to dismiss the complaint.

Three of the remaining five defendants are named as defendants in this complaint in their official capacities as local or state government officials. The defendants Rochford and O'Grady are being sued in their capacity as the past superintendents of the Chicago Police Department. The defendant Finley is named as a defendant in his capacity as the Clerk of the Circuit Court of Cook County. Because the liability of the defendants Rochford and O'Grady will rest upon the same considerations, the Court will determine those defendants' motions to dismiss together. The liability of the defendant Finley will be examined later.

In her complaint, the plaintiff asserts that the defendants Rochford and O'Grady have the duty to enforce and supervise the warrant recall procedures of the Chicago Police Department. The plaintiff alleges that the defendants' failure to properly implement and control existing recall procedures resulted in the arrest of the plaintiff, which is the subject matter of this lawsuit.

Each of the defendants has moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Although several grounds are asserted by the defendants, the primary ground relied upon by each is that they cannot be held liable for the alleged constitutional violations of their subordinates. Each of the defendants refer the Court to the well-established rule that Government officials cannot be found liable under the doctrine of respondeat superior.

It is clear from a review of the plaintiff's complaint that the defendants' positions are well-taken and that the complaint must be dismissed as to these defendants as well.

In holding that a municipal entity may be held liable under 42 U.S.C., Section 1983 in certain circumstances, the Supreme Court in Monell also made it clear that:

> "Local Government officials sued in their official capacities are 'persons' under Section 1983 in those cases in which a local government would be suable in its own name."

Monell at 690, Note 55.

Since the Court has previously determined that the present action does not fall within the perimeters of that decision, the Court must find another basis for imposing liability upon these two supervisory defendants from the allegations of the plaintiff's complaint. Absent such circumstances as existed in the Monell decision, the Court must conclude that the defendants may only be held liable if it is clear from the allegations of the complaint that these defendants were involved personally in the incidents giving rise to this cause of action. Adams v. Pate, 445 F.2d 105, Seventh Circuit, 1971.

The allegations of the complaint as to these two defendants are devoid of any specific facts asserting their personal knowledge of the alleged unconstitutional acts of their subordinates or their acquiescence in them. Cochran v. Rowe, 438 Federal Supplement 566, Northern District of Illinois, 1977.

Indeed, it is only asserted that these defendants knew of the "illegality of the procedures, regulations and customers regarding the recall of arrest warrants and negligently, willfully, and wantonly caused them to occur and to continue and took and continued to take no measures to prevent them."

Such conclusory allegations are insufficient to support any liability on the part of the defendants Rochford and O'Grady. Perry v. Elrod, 436 Federal Supplement 229, Northern District of Illinois, 1977.

It is personal involvement that is the touchstone of Section 1983 liability. Sanders v. Daley, 306 Federal Supplement 277, Northern District of Illinois, 1969.

It is clear that a supervisory policy official can be held liable for damages under 42 U.S.C., Section 1983 for his own personal negligent or willful conduct that is the proximate result of a civil rights violation. Schnell v. City of Chicago, 407 F.2d 1084, Seventh Circuit, 1969; Moon v. Winfield, 368 Federal Supplement 843, Northern District of Illinois, 1973.

However, it is equally clear that there must be an affirmative link between the alleged incidents of subordinate misconduct and the supervisory approval or acquiescence in such misconduct. Rizzo v. Goode, 423 United States 362, 1976.

The allegations of the complaint contain no specific facts asserting the existence of such an affirmative link.

The plaintiff's allegations are directed only to the defendants' duties as Superintendents of Police for the City of Chicago. There are no allegations that these defendants were aware of the plaintiff's situation and negligently or willfully failed to act. Moon v. Winfield, to which I have previously alluded.

Neither does the complaint contain any allegations that these defendants had been confronted with similar specific situations in the past. The plaintiff's abstract assertion that one or another constitutional right has been violated does not require the Court to determine that a claim has been adequately pleaded. Shakman v. Democratic Organization of Cook County, 435 F.2d 267, Seventh Circuit, 1970.

On the basis of the plaintiff's clearly conclusory allegations as to the defendants' knowledge of these acts and in the absence of specific allegations of facts revealing the relationship between the defendants Rochford and O'Grady and the alleged constitutional violations of their subordinates, this complaint fails to state a claim against these defendants. Saunders v. Cahill, 359 Federal Supplement 79, Northern District of Illinois, 1973; Huey v. Barloga, 277 Federal Supplement 864, Northern District of Illinois, 1967.

There is no basis from which the Court may construe the requisite personal involvement of the defendants Rochford and O'Grady from the facts as alleged in this complaint. Joseph v. Brierton, 431 Federal Supplement 50, Northern District of Illinois, 1976; Grillo v. Sielaff, 414 Federal Supplement 272, Northern District of Illinois, 1976.

Accordingly, the complaint must be dismissed against the defendants Rochford and O'Grady for failure to state a claim upon which relief may be granted.

We deal next with the defendant Finley's motion for summary judgment.

The defendant Finley's liability is asserted to rest upon his duty, as Clerk of the Circuit Court of Cook County, to establish and correct procedures for the notification of the Chicago Police Department of those arrest warrants which have been recalled by judicial order. The plaintiff asserts that the defendant Finley's failure to implement proper warrant recall procedures resulted in the arrest of the plaintiff in this action.

As the Court noted previously, the defendant has presented alternative motions to dismiss the complaint and

for summary judgment. When such motions are brought in the alternative, the Court is justified in treating each separately and the matters outside the pleadings that have been filed in support of the motion for summary judgment may properly be considered. Wholesale Auto Supply Company v. Hickok Manufacturing, to which I have previously alluded.

In the case at bar, the Court elects to first consider the defendant Finley's motion for summary judgment.

It is well-established that summary judgment is appropriate only where there are no genuine issues of material fact and the movant demonstrates that he is entitled to judgment as a matter of law. Carter v. Stanton, 405 United States 669, 1972; Butler v. Goldblatt Brothers, Incorporated, 432 Federal Supplement 1122, Northern District of Illinois, 1977.

Based upon the affidavits and documents filed by the defendant in support of his motion for summary judgment, it is clear that this is an appropriate case for the entry of an order granting summary judgment in favor of the defendant Finley and against the plaintiff.

In support of his motion for summary judgment, the defendant has filed a memorandum of the Clerk of the Circuit Court and an excerpt from the operating manual of the Clerk's office, both of which describe the warrant recall procedures that were in effect at the time of the alleged occurrences giving rise to this complaint. The defendant has also filed the affidavits of one Robert Grossman, the Chief Deputy Clerk of the Criminal Division of the Circuit Court of Cook County, and one Maurice McNicholas, the Deputy Clerk who was responsible for the recall of arrest warrants on the date that the warrant at issue herein was recalled by judicial order.

The plaintiff has filed no affidavits in opposition to those filed by the defendant Finley. Accordingly, the facts contained therein are to be taken as true and are uncontroverted for the purpose of this motion. Wang v. ..... Maxinhall Estates, Incorporated, 531 F.2d 832, Seventh Circuit, 1976; DeMert and Dougherty, Incorporated v. Chesebrough Ponds, Incorporated, 348

Federal Supplement 1194, Northern District of Illinois, 1972.

A careful examination of the procedures in effect at the time of the alleged occurrences, as shown by the documents and affidavits filed by the defendant Finley, shows that the warrant recall procedure of the Circuit Court of Cook County are more than adequate to satisfy constitutional requirements. Deputy Clerks are instructed to effectuate the notification of the Chicago Police Department of the recall of an arrest warrant on the same day that the judicial recall is entered. All personnel are aware of the serious consequences of a failure to so notify the Police Department in a timely manner. Several copies of the orders are filed with the Police Department and with the Clerk's office as well as being placed in the official court file.

In the absence of any specific challenges to these procedures, the Court would be unable to find that these procedures are unconstitutional. Rogers v. Provident Hospital, 241 Federal Supplement 633, Northern District of Illinois, 1965.

The plaintiff alleges only that the defendant Finley and his subordinates "did not fulfill their constitutional duty to communicate in a reasonable manner" the fact that a judicial order of recall had been entered. Such allegations are totally conclusory and fail to allege with specificity how the warrant recall procedure is unconstitutional on its face or how an unconstitutional act occurred as the proximate result of its application and practice as to this plaintiff. Shakman v. Democratic Organization of Cook County, to which I have previously referred.

In the absence of such specific allegations, the Court must conclude that the warrant recall procedures of the Circuit Court of Cook County are unconstitutional as applied to the allegations of the plaintiff's complaint. See Askew v. Bloemker, 548 F.2d 674, Seventh Circuit, 1973; Ashwell Company v. Transamerica Insurance Company, 407 F.2d 762, Seventh Circuit, 1969.

Furthermore, the affidavit of Maurice McNicholas and Exhibit B filed by the plaintiff show that the procedures outlined previously were followed as to the plaintiff's arrest warrant. At best, it can only be said that if the Police Department did not receive notice of the recall, the subsequent arrest of the plaintiff was the result of inadvertence or accident. Such circumstances cannot give rise to an action under 42 U.S.C., Section 1983. Little v. Walker, 552 F.2d 193, Seventh Circuit, 1977; Bonner v. Coughlin, 545 F.2d 565, Seventh Circuit 1976.

The documents and affidavits filed by the defendant show clearly that there is no genuine issue of fact that is undisputed. The purpose of a motion for summary judgment is to eliminate the necessity of a trial that can only result in needless expense and delay. Kirk v. Home Indemnity Company, 431 F.2d 554, Seventh Circuit, 1970.

The granting of a motion for summary judgment is a drastic remedy, but is also one that should be applied in appropriate circumstances. Mintz v. Mathers Fund, Incorporated, 463 F.2d 495, Seventh Circuit, 1972.

In light of the uncontradicted documents and affidavits of the defendant, it is clear that this is such a case. The Corut is unable to determine that any genuine issue of material fact exists in this case that would result in any judgment other than one for the defendant. Kiess v. Eason, 442 F.2d 712, Seventh Circuit, 1971.

Accordingly, the Court must allow the defendant Finley's motion for summary judgment and need not consider his alternative motion to dismiss the complaint.

We deal next with the motion of the defendants Pappas and Ziemke to dismiss the complaint.

The two remaining defendants are the only two defendants who are asserted to have been personally involved in the alleged unconstitutional arrest of the plaintiff. These defendants, police officers Pappas and Ziemke, were allegedly the officers who actually effectuated the arrest of the plaintiff pursuant to the judicially-recall warrant.

The plaintiff asserts that these defendants knew or should have known by reasonable inquiry that the warrant for the plaintiff's arrest had been recalled and that the subsequent arrest was illegal and without probable cause. The plaintiff asserts that despite her protests and explanation of the circumstances, the defendants Pappas and Ziemke "negligently, willfully and wantonly" arrested the plaintiff and incarcerated her for a period of six to seven hours.

The defendant Pappas and Ziemke have jointed filed motions to dismiss or, in the alternative, for summary judgment. The grounds asserted by these defendants primarily involve their good faith in effectuating the arrest of the plaintiff and the fact that they did not make sufficient inquiries into the validity of the outstanding warrant. Affidavits have been attached to the motions for summary judgment which recite their allegations of good faith and the steps they took to verify the arrest warrant. However, the defense of good faith can rarely be properly determined from affidavits and would be inappropriate in the circumstances of this case. Foster v. Zeeko, 540 F.2d 1310, Seventh Circuit, 1976; Alvarez v. Wilson, 431 Federal Supplement 136, Northern District of Illinois, 1977.

However, such a determination need not be made in this case as it is clear to the Court that the plaintiff has failed to plead a claim upon which relief may be granted and the complaint must be dismissed as to the defendants Pappas and Ziemke.

It is axiomatic that the threshold inquiry in any action seeking to redress alleged constitutional violations, whether under 42 U.S.C., Section 1983 or 28 U.S.C., Section 1331, must be whether, in fact, a claim of constitutional magnitude has been properly alleged. Butz v. Economu, 438 United States 478, 1978; Paul v. Davis, 424 United States 693, 1976.

It is this threshold requirement that the plaintiff has failed to satisfy in the allegations of her complaint.

Notwithstanding this Court's determination of the motions of the other defendants in this action on other

grounds, it is now necessary to analyze the plaintiff's complaint in terms of whether a cognizable claim under 42 U.S.C., Section 1983 has been pleaded. The question of supervisory liability and the application of the doctrine of respondeat superior is totally separate from considerations of whether a claim has been substantively pleaded. The existence of vicarious liability is similar to the principles of immunity and a finding of nonliability warrants the Court to proceed no further in its inquiry into the existence of a constitutional claim. Dieu v. Norton, 411 F.2d 761, Seventh Circuit, 1969; Peckham v. Scanlon, 241 F.2d 761, Seventh Circuit, 1957.

However, the liability asserted to exist against these defendants is personal in nature and the Court must determine whether a claim has been pleaded properly in order to invoke Section 1983 liability.

The Court finds the present case to be governed by the recent Supreme Court decision of Baker v. McCollan, No. 78-752, decided June 26, 1979. That decision is indistinguishable from the facts alleged in the plaintiff's complaint. In Baker, the plaintiff was arrested and incarcerated for several days pursuant to an arrest warrant that was intended for his brother, but which contained the plaintiff's name on its face. That warrant was no more invalid than the one alleged to exist in this action. Both warrants were valid on their face and in each situation there was an arrest pursuant to the warrant.

In Baker, as is alleged to have occurred here, there were continued protests of the plaintiff that the arrest was improper. The period of incarceration in Baker was several days; in this action, the time spent in custody amounted to only a few hours. On such similar facts, the Court must find the recent decision of Baker v. McCollan to be controlling.

The Supreme Court held that the plaintiff had failed to satisfy the threshold requirement of a finding that he had been deprived of a right "secured by the Constitution and laws" within the 42 U.S.C., Section 1983. The

Court held that the plaintiff had been deprived of his liberty for a period of days, but that such incarceration was pursuant to an arrest warrant that conformed to the requirements of the Fourth Amendment. The Court recognized that mere detention pursuant to a valid warrant will, after a certain period of time and in the face of repeated protests, deprive an individual of "liberty without due process of law." However, the Court concluded, and this Court is in full agreement, that a detention of several days cannot amount to such a deprivation of liberty. It is clear that a detention of six to seven hours, also pursuant to a warrant conforming to Fourth Amendment requirements, cannot amount to a deprivation of civil rights under the Constitution.

It is now well-settled that not every allegedly invalid arrest or imprisonment can give rise to a cause of action under 42 U.S.C., Section 1983. That section of the Civil Rights Act was never meant to be a fount of federal tort law. Paul v. Davis, to which I have previously referred.

While a claim for unlawful arrest and detention may be properly brought under Section 1983, Joseph v. Rowlen, 402 F.2d 367, Seventh Circuit, 1968, the Court must find that on the facts as alleged in the plaintiff's complaint against the defendants Pappas and Ziemke, there has been no unlawful arrest and detention of constitutional magnitude and the plaintiff's claim is not cognizable under 42 U.S.C., Section 1983.

While it appears that a possible State tort claim may lie under the circumstances of the plaintiff's complaint, no violation of the plaintiff's civil rights has been properly pleaded. Estelle v. Gamble, 429 United States 97, 1978; Brainerd v. Potratz, 421 Federal Supplement 836, Northern District of Illinois, 1976.

Accordingly, the defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted must be allowed. The plaintiff can prove no set of facts that would entitle her to relief under 42 U.S.C., Section 1983 or 28 U.S.C., Section 1331. Burns v. Paddock, 530 F.2d 18, Seventh Circuit,

1974; Grillo v. Sielaff, 414 Federal Supplement 272, Northern District of Illinois, 1976.

Finally, the Court notes that a seventh defendant has been named by the plaintiff in this action. That defendant, Police Officer Meyers, has never been served with summons and complaint. The service of summons was returned unexecuted on April 2, 1979.

The Court also notes that the plaintiff's memoranda filed in this action in opposition to the various motions to dismiss are devoid of any reference to that defendant. Since more than six months have elapsed since this complaint was filed on March 23, 1979, the Court will enter an order dismissing the defendant Meyers from this action pursuant to the provisions of Rule 21 of the General Rules for the Northern District of Illinois for want of prosecution.

Accordingly, Miss Clerk, the motions of The City of Chicago, James T. Rochford, James O'Grady, John Ziemke and Theodore Pappas to dismiss the complaint for failure to state a claim upon which relief may be granted are allowed. The motion of the defendant Morgan M. Finley for summary judgment is also allowed. The defendant Meyers is dismissed from this action for want of prosecution. This complaint is hereby dismissed with prejudice and no costs as to the defendants City of Chicago, James T. Rochford, James O'Grady, John Ziemke and Theodore Pappas. Judgment is hereby entered in favor of the defendant Finley and against the plaintiff Toni Murray.

MS. DUNCAN-BRICE: Thank you very much, your Honor.

MS. ROBINSON: Thank you, your Honor.

MR. SCHLAM: Thank you, your Honor.

(WHICH were all the proceedings had and taken on the day and date aforesaid in the above-entitled cause.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 31, 1980

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

TONI MURRAY,

Plaintiff-Appellant,

No. 80-1035 vs. On Petition for Rehearing

CITY OF CHICAGO, et al.,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by defendants-appellants, no judge in active service having voted to grant the petition for rehearing *en banc*, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Edward Dumbauld, United States Senior District Judge for the District of Pennsylvania, sitting by designation.